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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 113

UNITED STATES OF AMERICA, - - Petitioner,

versus

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - - Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit.

BRIEF FOR HOMER O. CORRELL AND DOROTHY CORRELL.

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BRIEF FOR HOMER O. CORRELL AND DOROTHY CORRELL.

PRELIMINARY STATEMENT.

Respondents accept the government's Statement of Opinions Below, Jurisdiction, Questions Presented, Statute Involved and Statement of the Case.

SUMMARY OF ARGUMENT.

Section 162 (a) (2) of the Internal Revenue Code of 1954 permits a taxpayer to deduct the cost of meals while away from home in the pursuit of his business. The respondent, a traveling salesman, ate his breakfast and noon meal in restaurants located in towns some

fifty to sixty-five miles from his home in Fountain City, Tennessee. The respondent would leave home each morning shortly after 4:30 A.M. and return home around 6:00 P.M. in the evening.

The eating of such meals in distant towns was business induced and was directly related to the respondent's business. His employer required him to eat both meals at particular restaurants and these restaurants were also customers of the respondent.

The wording of Section 162 (a) (2) of the Code is not ambiguous and does not require a strained interpretation. The Commissioner's rule that before a taxpayer is away from home he must remain away overnight or for a period requiring sleep or rest is a modification of the statute and beyond the powers granted by Congress.

All courts deciding this issue, except the First Circuit, have refused to adopt the Commissioner's interpretation. The First Circuit's decision is in error in that the Court failed to recognize the important separation of functions of the various branches of our government.

There is a great distinction between traveling salesmen and daily commuters. The facts in this case clearly establish such distinction. A commuter has the option of eating his breakfast and noon meals at home while the demands of business require the traveling salesman to eat in restaurants located in distant towns or cities. Since a commuter's meal is not business induced he is not permitted a deduction for the cost of

meals and the rationale behind such rule is quite reasonable.

The legislative history is very brief and can hardly be said to support the Commissioner's interpretation. Resort to legislative history should be made only when the language of the statute is ambiguous. The Commissioner contends that his ruling is of long-standing but his interpretation has never been made a part of the pertinent regulations. Moreover, the failure of Congress to change the wording of the code section despite many Court decisions repudiating the Commissioner's interpretation and constant urgings by the Commissioner to make certain changes would appear to indicate that Congress approves of the respondents' interpretation.

The overnight rule bears no rational relation to the business necessity of the meal expense and any rule of thumb using a time factor cannot be a valid regulation under the present statute.

ARGUMENT.

I. The Respondent Was Away From Home in the Pursuit of His Trade or Business When He Ate Breakfast and Lunch During the Years in Issue.

Section 162 (a) (2) of the Internal Revenue Code of 1954 provides that a taxpayer may deduct the entire amount expended for meals while away from home in the pursuit of his trade or business. The fact that the respondent was "away from home" when he ate both his morning and noon meals cannot be disputed. During the years in issue, the respondent lived in Fountain

City and on a typical day ate breakfast in Sweetwater, Tennessee, which is some fifty miles from Fountain City, and subsequently ate lunch in Athens, Tennessee, which is approximately sixty-five miles from Fountain City (R. 47a-53a, 58a).

The government has never disputed the fact that the respondent was actively pursuing his trade or business when he ate both his morning and noon meals. In this connection the record shows that the respondent was a salesman for Hale Brothers, Inc., which has as its principal business the distribution of fruits, vegetables, canned goods and frozen foods (R. 25a-26a). In his capacity as a salesman for Hale Brothers, Inc., the respondent had the responsibility to call on customers located throughout a section of east Tennessee, which included the cities of Madisonville, Englewood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette and Jellico (R. 45a). Due to the nature of the business involved, the respondent's employer required him to be in his territory at the beginning of the business day (R. 28a-29a). To do so he had to arise each morning at 4:30 A.M. in order to drive the necessary distance and to arrive in his territory at the required time (R. 28a-29a, 46a, 51a-52a). The respondent was also required to eat breakfast and lunch at a specified customers' restaurant where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 6:00 P.M. (R. 49a, 54a). The respondent does not travel the same route each day but the above correctly reflects the time and distances.

Thus, as shown above, the respondent was "away from home in the pursuit of his trade or business" when he ate both breakfast and lunch. By applying these undisputed facts to the law as stated in Section 162 (a)(2) of the Code, there would appear to be no question concerning the respondent's right to deduct the cost of eating breakfast and lunch and/or to exclude any amounts received as reimbursement for such expenses from his taxable income.

The controversy arises, however, because the Commissioner contends that before a taxpayer is "away from home" he must remain away from home "overnight" or for a "period requiring sleep or rest".

II. The Commissioner's Added Requirement That a Taxpayer Must Remain Away From Home Overnight or For a Period Requiring Sleep or Rest Is an Amendment or Modification of the Statute and Exceeds the Commissioner's Authority to Prescribe Rules and Regulations.

The Commissioner's interpretation that a taxpayer is not away from home unless he remains away overnight or for a period requiring sleep or rest is so obvious a modification of the phrase "while away from home" as to preclude any reasonable argument to the contrary. There is nothing ambiguous about the meaning of the phrase while away from home. While away from home in its plain, ordinary and popular sense means precisely what it says. It means travel while away from one's home. If Congress had intended some other connotation, how simple it would have been for

Congress to have changed or amended the code section to read "while away from home overnight" or "while away from home for a period requiring sleep or rest" if that was the interpretation intended.

The Commissioner attempts to justify his modification of the code section by contending that Congress never intended to grant an alleged windfall to certain taxpayers by permitting them to deduct expenses which would otherwise constitute non-deductible personal living expenses except for the fact that the taxpayers are away from home at the time the expenses are incurred. In the same breath, however, the Commissioner admits that the cost of such meals are deductible but argues that Congress must have contemplated that the deduction would be allowed only when there exists an increase in or a duplication of living expenses. The fallacy in such an argument can be proven by the fact that there can never be a duplication of meal expenses. Unlike lodging expenses, the purchase of meals, either on a one day trip or on an overnight trip, can never result in increasing the cost of meals to a taxpayer since there is a corresponding reduction in the cost of meals at home. Nor will the cost of such meals be greater if a taxpayer stays away overnight rather than returning home at the end of the business day. Thus, under the Commissioner's theory there can be no more justification for deducting the cost of meals while away overnight than for deducting the cost of such meals on a one day trip.

Moreover, why must we assume, as the Commissioner so strongly contends, that Congress did not in-

tend to favor businessmen who travel away from home as opposed to those who travel in their own home town. The granting of such deductions has long been a matter of legislative grace and there are numerous instances where our tax laws favor a certain group of taxpayers. But even assuming, for the purposes of argument, that a group of taxpayers realize a windfall under the statute as written, does this give the Commissioner the power to change the law as written by Congress? Obviously such is not the case.

It seems to be agreed by many that the jet age has helped create the present problem since a taxpayer can now travel great distances and still return home at the end of the business day. While this may or may not be the cause of the problem, the respondent submits that any change in the law, if one be required, to equalize the tax status of a traveling salesman and a daily commuter must be made by Congress and not by the Commissioner of Internal Revenue.

The Commissioner also argues that the overnight or sleep or rest rule must be adopted because, without such a rule, it will be difficult to determine when a taxpayer is "away from home". This argument should be given little weight since many sections of the Internal Revenue Code require that each case be decided on its own particular facts. An excellent example is the much litigated imposition of the accumulated earnings tax penalty under Section 531 *et seq.*, of the Code. The Courts have had little difficulty in applying the while away from home test. In the case of *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C.A. 1st 1952), the Court

held that a salesman who traveled only in the greater Boston metropolitan area was not away from home within the meaning of Section 162 (a)(2) of the Code. The fact it may be difficult to determine each case does not appear to burden the Courts. The Tax Court in the case of *Bagley* v. *Commissioner,* 46 T.C. 176, reversed 374 F. 2d 204 (C.A. 1st 1967), in repudiating the Commissioner's overnight rule, made the following observation:

> "We do not deny that the overnight rule is one of administrative convenience. Indeed it provides simplicity and certainty. But just as most rules of law yield to exceptions, so too must administrative workability yield to logic, reason and justice. Therefore, in line with the general views expressed by the Courts of Appeals in *Williams, Hanson* and *Chandler,* we will no longer follow the overnight rule as an absolute guide in every situation. * * * Consequently, each case will be decided according to its own facts."

While all of the arguments used by the government may or may not be good reasons for changing the law, none support the right of the Commissioner to amend or modify the law as written. It has long been held that the power of the Commissioner to prescribe regulations for the administration of the Federal tax laws is not the power to make law. *Manhattan Co.* v. *Commissioner,* 297 U. S. 129. Neither may a regulation alter, amend, extend or modify the provisions of a statute. *Morrill* v. *Jones,* 106 U. S. 466; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599.

The Sixth Circuit in the instant case specifically held that the Commissioner was attempting to modify Section 162 (a)(2) of the Code. In this regard the Court stated:

> "* * * while the rule adopted by the Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary".

Also see the case of *Hanson* v. *Commissioner,* 298 F. 2d 391 (C.A. 8th 1962), wherein the Eighth Circuit states at page 397:

> "* * * the overnight rule is merely an arbitrary line drawing having no basis in the statute * * * that is it '* * * more in the nature of legislation than interpretation and accordingly go[es] beyond the rule making power of the Internal Revenue Service'."

Even the Tax Court of the United States, which had previously supported the Commissioner's view, reconsidered its prior decisions in the case of *Bagley* v. *Commissioner, supra,* and made the following pertinent comment at page 183 of its opinion:

> "* * * as the Supreme Court has often said, 'the words of statutes—including revenue acts—should be interpreted where possible in an ordinary, everyday sense'. *Crane* v. *Commissioner,* 369 U. S. 672, 687-688."

The Fifth Circuit in the case of *Williams* v. *Patterson,* 286 F. 2d 333 (C.A. 5th 1961), likewise held the

Commissioner's interpretation was a change in the law and in so holding stated at page 335:

> "* * * Second, we note particularly that there is no language in the statute limiting its application to 'expenses incurred while * * * away from home *overnight.*' The 'overnight' gloss was dreamed up by the department. Third, there is nothing in the statute indicating any Congressional intent that 'away from home' means either overnight or away from home for a period substantially longer than an ordinary working day, or that it means 'a trip on which the taxpayer's duties [in his released time] required him to obtain necessary sleep away from his home terminal'."

Other cases which have repudiated the Commissioner's interpretation as being beyond the rule making powers granted by Congress are *U. S.* v. *Morelano,* 356 F. 2d 199 (C.A. 8th 1965); *Chandler* v. *Commissioner,* 226 F. 2d 467 (C.A. 1st 1955); *Scott* v. *Kelm,* 110 F. Supp. 819 (D.C. Minn. 1953); *Ahrens* v. *U. S.,* 264 F. Supp. 518 (D.C. Ill. 1967).

The only Court to agree that the Commissioner has the authority to modify the code section was the First Circuit in the case of *Commissioner* v. *Bagley,* 374 F. 2d 204 (C.A. 1st 1967). The respondent submits that the First Circuit completely ignored the important separation of functions of the legislative, executive and judicial branches of our government. Under this decision, the Commissioner could amend, modify, or extend any statute so long as it was allegedly done for administrative purposes. While all must agree that

the Commissioner has the power to prescribe rules and regulations, no rule or regulation which is inconsistent with the statute or amends the plain meaning of such statute falls within the definition of rules and regulations interpreting the law.

The respondent submits that the Commissioner's overnight or sleep or rest rule is an amendment, extension and modification of Section 162 (a) (2) of the Code and beyond the powers granted by Congress.

III. The Costs of Meals Incurred on a Business Trip Are Not Personal Expenses But Are Deductible as Business Expenses.

The key to the deduction of meals expense is whether such expenses are business induced. Note that the government never attempts to argue that the cost of such meals are not related to the respondent's business. In fact the government avoids discussing the business relationship entirely.

The principal argument, if not the sole argument, of the Commissioner in support of his position is that, without the overnight rule, a businessman on a one day business trip realizes a tax break that is not available to a daily commuter. As stated above this argument completely ignores the fact that such meals are required by the exigencies of business. Actually, however, there is a tremendous difference between a daily commuter and a salesman traveling away from home in the pursuit of business.

Theoretically, if not as a practical matter, a commuter has the choice of eating downtown or returning

home for any given meal. Most men eat their noon meal in town rather than at home as a matter of personal convenience. Even in those cases where the commuter's home is too far away from his office to enable him to return home for the noon meal, the location of his home was still a personal choice of the daily commuter. On the other hand, when a salesman is traveling on the road in the pursuit of his business he has no choice but to eat his meals in a restaurant located in a distant city or town. Thus, the expense of these meals is directly related to the salesman's business and is a deductible item for that reason. The Sixth Circuit recognized this point in the *Correll* case:

> "The theory of Section 162 (a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an expense incurred in producing income. The Commissioner's 'overnight' or 'sleep or rest' rules bear no rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute * * *"

The Commissioner is apparently obsessed with the idea that a taxpayer who travels away from home on business for one day may realize a tax benefit not afforded the daily commuter. But how does the Commissioner's overnight rule affect a salesman such as the

respondent whose daily routine in no way resembles a commuter. How many commuters are required by their employers to arise each morning at 4:30 A.M., drive fifty miles in order to be in their territory at the beginning of the business day and eat breakfast and lunch at a particular restaurant where his employer can reach him by telephone if necessary. Yet, under the Commissioner's rule, the respondent, who does the above, would not be permitted to deduct the cost of his breakfast or noon meals under the theory that this would discriminate against the daily commuter.

The respondent submits that the facts in the instant case establish beyond any doubt that the Commissioner's rule is arbitrary and defeats the Congressional intent to permit a businessman to deduct the cost of meals while away from home in the pursuit of his business.

The overnight rule is arbitrary in many ways. Why should the respondent be forced to spend the night in Athens, Tennessee, or Sweetwater, Tennessee, before he can deduct the cost of his meals. As stated previously, the cost of these meals is no greater if the respondent spends the night than if he returns home to his family. In fact, does this not discriminate against those taxpayers who would prefer to come home each night to be with their family rather than to stay in a motel in a distant city. If any discrimination exists, it would appear to be between businessmen who travel away from home rather than between businessmen who travel away from home and the daily commuter.

The legislative history in no way supports the Commissioner's view. It must be remembered that the highly publicized case of *Hanson* v. *Commissioner, supra,* was decided on January 16, 1962. It is very unlikely that the decision in this case escaped the attention of Congress. In fact, the government admits on page 25 of its brief that the Treasury brought this problem to the attention of Congress in 1963. Despite these facts, Congress has yet to change Section 162 (a) (2) of the Code to clarify what the Commissioner contends is a major problem in tax regulation.

In its brief, the government places great weight on the fact that during a Senate hearing in 1954 on new Code Section 62 (2) (c) the phrase "while away from home overnight" was used by the Committee in describing the prior law as to deductibility of transportation expenses. Inasmuch as Congress has not been heard from since making that now infamous statement, is it not more logical to assume that the statement was a slip of the tongue rather than an express statement of the law under Section 162 (a) (2) which was not even under consideration. See S. Rep. No. 1622, 83rd Cong. 2d Sess. p. 9. Note that in the very next paragraph the committee refers to "while away from home" without mentioning overnight.

Surely if Congress intended to adopt the Commissioner's rule some action would have been taken by now, especially in view of the numerous cases holding against the Commissioner and the urgings of the Commissioner to change the wording of Section 162 (a) (2) of the Code.

It must be remembered that prior to 1924, only the amount which the cost of a meal exceeded the cost of the same meal if eaten at home was deductible. However, Congress changed this rule by permitting the taxpayer to deduct the entire amount expended for meals incurred on a business trip. If any further limitation was intended what better opportunity could Congress have had to limit the deduction if that was considered necessary. See H. Rep. No. 350, 67th Cong., 1st Sess. p. 11; S. Rep. No. 275, 67th Cong. 1st Sess. p. 14.

The government contends that the Commissioner has consistently interpreted the statute as allowing a deduction for the cost of meals only when the trip required sleep or rest. Note however, that such interpretation is still not a part of the substantive provision—Sec. 1.162-2, Income Tax Regs., relating to traveling expenses. This point is cleverly ignored by the government throughout its brief.

On page 20 of its brief, the government also points out that it is well established that congressional review and re-enactment of a tax statute after being informed of the Commissioner's interpretation provides persuasive evidence of congressional approval. Since in the instant case Congress was made aware of the decision in *Hanson* v. *Commissioner, supra,* in 1963, does this not more clearly indicate that Congress, by failing to amend the wording of the code section, gave its tacit approval to the respondents' interpretation of the phrase "while away from home":

As shown above the legislative history is rather sparse and sheds little light on the question before the Court. Moreover, it is well settled that legislative history is nothing more than an aid to be used by the Courts in reaching a decision and, when not illuminating, should be given little weight, if any, in arriving at a decision.

CONCLUSION.

The judgment of the Court of Appeals for the Sixth Circuit should be sustained.

Respectfully submitted,

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